

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

To Be Argued By:

HOWARD J. DILLER

77-1085

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

- against -

JUAN ANTONIO ALVAREZ, et al,

Defendants, et al,

JAMES LAWS,

Defendant-Appellant.
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BRIEF AND SUPPLEMENTAL APPENDIX FOR APPELLANT LAWS

ON APPEAL FROM A JUDGMENT OF CONVICTION
OF THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA, :

Appellee, :

- against - :

JUAN ANTONIO ALVAREZ, et al, :

Defendants, : :

DOCKET NO. 77-1085

JAMES LAWS, :

Defendant-Appellant. :

----- X

BRIEF FOR APPELLANT LAWS

Preliminary Statement

JAMES LAWS respectfully appeals from a judgment of the United States District Court for the Southern District of New York (Owen, J.) entered on January 21, 1977, sentencing him to two concurrent terms of imprisonment of ten (10) years on his conviction after a jury trial for violations of Title 21, U.S.C. § 812, 841 (a) (1) 841 (b) (1) (A), 846, and conspiracy to commit those offenses.

Appellant is presently confined pursuant to said judgment.

Statement of Facts

Appellant LAWS and thirty-two (32) co-defendants were charged in indictment number 76 CR 324 with conspiracy to violate the narcotics laws of the United States (Count 1). Appellant LAWS was also charged with a substantive violation of Title 21, U.S.C. §§ 812, 841 (a) (1) and 841(b) (1) (A) (Count 30). After a jury trial before the Honorable Richard Owen, LAWS was convicted of both counts and sentenced to ten (10) years imprisonment.

The Government's theory, as set forth in the indictment and as developed at trial, was that LAWS was a third-level distributor of cocaine whose source of supply was one JOHN BROWN, a co-conspirator who testified for the Government. BROWN was in turn a middle-man in the "loose-knit business organization" alleged in the indictment who received his merchandise from the importers and primary source of supply, namely JUAN ANTONIO ALVAREZ. The evidence against LAWS that purported to show his membership and participation in the conspiracy which the Government alleged lasted from January 1, 1968 to mid 1976, consisted of the following:

JOHN (JACK) BROWN testified that he met appellant LAWS for the first time in 1956. In the summer of 1970, he had a conversation with LAWS regarding the latter's purchasing of cocaine from him in the future. BROWN told

LAWS that whenever LAWS was ready to do so he could go to ERDWN'S apartment at 180 West End Avenue, in New York City for that purpose (1200).^{*} Sometime in June of 1970, LAWS went to BROWN'S apartment and purchased one kilogram of cocaine (1201). During that transaction LAWS asked if in the future he could send his girlfriend to pick up the cocaine because he had "a little heat" on him and he did not want to come down too often (1201). BROWN indicated that that arrangement would be O.K. so long as LAWS vouched for whomever he sent. After that, a girl came down approximately once a month until 1972 to purchase coke for LAWS (1202).

Some time in March or April of 1972, LAWS asked BROWN to come to his house in Astoria, Queens. On that occasion ERDWN took a kilogram of cocaine to him (1203-1204).

BROWN also testified that in November of 1971, three weeks after having a conversation with one Bay Brown about LAWS, LAWS came to BROWN'S apartment and gave him money for a kilogram of cocaine. The cocaine was picked up later by LAWS' "girl" (1206-1207).

^{*} Numbers in parenthesis refer to pages in the trial transcript.

During the witness' testimony, the Assistant United States Attorney informed the Court and defense counsel at a side conference that BROWN would not identify LAWS in court because he (BROWN) was afraid to point out the wrong man. The witness' uncertainty was due to a discrepancy between his recollection of LAWS' appearance and LAWS' appearance at trial (1195-1199).

MICHAEL PARKER, another middle-man in the conspiracy and an associate of Jack Brown, testified that he was introduced to LAWS by Brown sometime during the period between February, 1971 and July, 1972. (3393). In the fall of 1971, he and Jodi, Brown's wife, went to 140th Street and 8th Avenue, in New York City, to deliver a kilo of cocaine to Laws. Brown had told him to take Jodi uptown to meet LAWS (3400), because LAWS was buying coke from him (3405). At that time Brown gave Jodi a brief case. When he and Jodi got to their destination, Jodi left the car and was gone for about an hour. When she returned she apologized for being late and explained that she had to count the money. She did not tell the witness how much money she had (3400-3401).

PARKER also testified that during the fall of 1971, he went to Queens with BROWN because, according to BROWN, LAWS owed him money. When they got there, no one answered the door for approximately twenty minutes.

Then LAWS answered and let Brown in, while PARKER waited in the car.. Brown came out about an hour later and they drove back to Brown's apartment at 180 West End Avenue (3401-3404).

Earlier in his testimony PARKER said that on one occasion he saw LAWS and BROWN go into BROWN'S bedroom and on another occasion LAWS drove him (PARKER) and Brown to 10 West 66th Street (3399-3400). Parker was able to identify LAWS in court (3393-3394).

On cross-examination PARKER admitted that he never saw anyone give a package to LAWS and that he never saw LAWS give a package to anyone (4028).

ESTELLE TOMPKINS, a paid government informant for many years, a heroin addict, and an admitted shoplifter, testified she met LAWS in 1947, but was "probably" introduced to him in 1960 (5746-5763). Over strenuous objection, she was permitted to testify that in 1962 LAWS sold her a package containing heroin (5789-5792). Also over objection, she testified that in 1965 she spoke to LAWS about purchasing heroin. LAWS suggested she see a man named Shirt. Some time thereafter she met Shirt in LAWS' apartment and purchased heroin from him and paid him with clothing she had shoplifted (5794-5795). She purchased heroin from Shirt in that manner on several occasions but LAWS was present only on some of the occasions (5795-5796).

The witness also testified that LAWS introduced her to Charles Cowper, a co-conspirator, in 1966 or 1967 (5800).

EDWARD RYBACKI, a New York City Detective, testified, ^{he} that on January 8, 1976/showed a photographic array portraying approximately 70 individuals to John Brown (5870-5871).

Over objection that it would indicate a "rogues gallery" procedure, the government was permitted to enter into evidence page 12 of its Exhibit 136 which was a photograph of appellant LAWS and Brown's initials thereon indicating that Brown had identified LAWS(5874-5879).

The following then occurred:

Q. And whose photograph is that, if you know?

A. It appears to be a New York City Police Department photo.

MR. DILLER: Your Honor, I object and move for a mis-trial.

(5880)

The Court reserved decision on the mis-trial motion until the following day when it was denied.

No other evidence concerning appellant Laws was received from the Government. Prior to the jury retiring for deliberation, the Court instructed them to render special verdicts as to when each defendant entered the conspiracy. Appellant LAWS was found by the jury to have entered after May 1, 1971. He was found guilty on both the conspiracy count and the only substantive count charged against him.

POINT I

APPELLANT WAS DENIED A FAIR TRIAL BY THE INTRODUCTION OF TESTIMONY RELATING A SALE OF HEROIN BY APPELLANT ALLEGED TO HAVE OCCURRED SIX YEARS PRIOR TO THE COMMENCEMENT OR THE CONSPIRACY CHARGED IN THE INDICTMENT.

The witness Estelle Tompkins testified that in 1962, six years before the conspiracy charged in the indictment commenced, and eight years before appellant's first alleged affirmative act in the conspiracy,* appellant sold her a package of heroin. Defense counsel vigorously objected throughout most of the witness's testimony on the grounds of relevancy and prejudice (5790-93), but the Court deemed it "background" information (5796,5798).

Counsel further indicated that there had been no testimony linking LAWS with the sale or possession of heroin, to which the prosecutor replied:

"You just heard it". (5798)

* John Brown testified that the first time appellant LAWS purchased cocaine from him was 1970.

Finally, when co-counsel asked for limiting instructions as to the other defendants, the Court addressed the jury and instructed them to consider the testimony only "against" LAWS (5789-90).

We submit that this highly prejudicial testimony served only one purpose, to inflame the jury against LAWS and to convey the impression that he was a heroin trafficker of long standing; thereby making it easier for them to believe that he would deal in cocaine as charged in the indictment.

Contrary to the trial Court's assertion, TOMPKINS' testimony was not background information because (a) it was too remote in time to have any rational connection with the conspiracy charged, and (b) the participant in the alleged sale (Tompkins herself) had no connection to that conspiracy whatsoever.

In this circuit the law is clear that in order to introduce evidence of other criminal acts by a defendant, that evidence must be substantially relevant for a purpose other than merely to show defendant's criminal character or disposition. U.S. v Miranda, 526 F.2d 1319 (2d Cir., 1975); United States v. Santiago, 528 F.2d 1130 (2d Cir., 1976); United States v. Chestnut, 533 F.2d 40 (2d Cir., 1976). In addition, and perhaps more significant,

the evidence's probative value must outweigh its potential prejudice. United States v. Natale, 526 F.2d 1160 (2d Cir., 1975); United States v. Leonard, 524 F.2d 1076 (2d Cir., 1975); United States v. Papadakis, 510 F.2d 287 (2d Cir., 1975).

Among the purposes for which this kind of evidence may be introduced are to prove knowledge, intent or design where those considerations are placed in issue in the case (United States v. Koska, 445 F.2d 1220 [2d Cir., 1971];

United States v. Brettholz, _____, 485 F.2d 483 [2d Cir., 1973]; United States v. Carrol, 510 F.2d 507 [2d Cir., 1975]), to show development of a conspiracy (United States v. Natale, 526 F.2d 1160 [2d Cir., 1975]; United States v. Torres, 519 F.2d 723 [2d Cir., 1975]), or to prove an element of the crime charged (United States v. Papadakis; United States v. Harvey, 526 F.2d 529 [2d Cir., 1975]).

But whatever the proper purpose is,

the trial judge is required to balance all of the relevant factors to determine whether the probative value of the evidence outweighs its prejudicial character.

United States v. Brettholz, supra, 485 F.2d at 487 .

In this case, given the six year span between the prior act and the commencement of the conspiracy

(cf. Chestnut, supra) and given the lack of connection between the witness TOMPKINS and the conspiracy, (Cf. Carrol, supra), we fail to see what probative value TOMPKINS' testimony had to the charges against LAWS. The alleged transaction could hardly be considered part of the overall conspiracy (Cf. Papadakis, supra).

Moreover, since the prior act was an isolated one* it requires ~~an active imagination to view it as background~~ leading to the development of the conspiracy (Cf. Torres, supra). **

Similiarly, intent was never really an issue in the case, (Cf. Brettholz, supra) and even if it were, the jury could reasonably infer intent from the other evidence against LAWS. Nor did the defense raise any issue that the evidence of the prior act could contradict or overcome (Cf. Koska, supra, where the prior-crime evidence was admitted to overcome defense of entrapment; see also Harvey, supra).

In short, we fail to see on what theory the evidence of LAWS' prior act could be considered a substantially "relevant" to the charges on trial.

* Tompkins testified that when she spoke to LAWS again about purchasing heroin from him, he referred her to someone else (5794).

**In order for this alleged prior act to have been background to the conspiracy, some nexus between the act and the conspiracy should have been shown. See, for example, Torres, supra, where the testimony complained of showed that some of the participants in the narcotics conspiracy charged had had prior drug dealings with each other, and, more significantly, the prior acts occurred within months of the conspiracy. See also, U.S. v. San Martin, 505 F.2d 918 (9 Cir.1974)

On the contrary, the testimony was elicited merely to show LAWS' alleged criminal character and predisposition to engage in narcotics traffic. Its prejudicial character is self-evident, particularly since it involved the sale of heroin, which, unlike cocaine, its very mention evokes antagonistic emotional reactions on the part of the jury. And LAWS was even further prejudiced by this testimony by the Court's "limiting" instructions to the jury that they were to consider it only against him. These instructions, although well-meaning and necessary for the other defendants on trial, only served to highlight the testimony as far as LAWS was concerned.

Thus, having heard that as far back as 1962, appellant LAWS was dealing in heroin, it required small effort for the jury to conclude that nine years later he would be willing to deal in cocaine. Whatever doubts they may have entertained about the credibility of the other witnesses,* TOMPKINS' testimony served to convince them that appellant would, and did, involve himself in the conspiracy.

Having been thus prejudiced a new trial is required.

* Even though BROWN testified that he sold cocaine to appellant in 1970, the jury found that the latter did not enter the conspiracy until after May, 1971.

POINT II

APPELLANT WAS DENIED A FAIR
TRIAL BY THE COURT'S ADMISSION
INTO EVIDENCE OF "MUG-SHOT"
PHOTOGRAPHS OF APPELLANT IDENTIFIED
AS SUCH BY A GOVERNMENT WITNESS

That the introduction of photographs of a defendant may well be equivalent to the introduction of direct evidence of a prior criminal conviction has been articulated in a number of recent opinions which have recognized that the introduction of certain photographs may result in getting before the jury the fact that the defendant has a prior record, and so has deprived the defendant of his right to a fair trial.

So said this Court in United States v. Harrington, 490 F.2d 487, 490 (1973). In that case, as here, the prosecution sought to "salvage" the identification of defendant by relating a previous out-of-court identification made by a government witness from "mug shot" photographs. This Court, after conducting an exhaustive analysis of the leading cases on the issue,* formulated

* Barnes v. United States, 365 F.2d 509 (D.C.Cir., 1966); Dirring v. United States, 328 F.2d 512 (1st Cir., 1964); Talls v. U.S., 344 F.2d 467 (1st Cir., 1965); U.S. v. Colarco, 424 F.2d 657 (2nd Cir., 1970); U.S. v. Gimelstob, 475 F.2d 157 (3rd Cir., 1973); U.S. v. Harman, 349 F.2d 316 (4th Cir., 1965); U.S. v. White, 444 F.2d 1274 (5th Cir., 1971); U.S. v. Reed, 376 F.2d 226 (7th Cir., 1967); Anthony v. U.S., 433 F.2d 952 (9th Cir., 1970).

a three-pronged test which the prosecution must meet in order to overcome the argument that the admission of such evidence results in reversible error:

1. The Government must have a demonstrable need to introduce the photographs; and
2. The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and
3. The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.

Ibid, at 494.

This formulation flows from what the Court described as "a basic tenet of our criminal law" that a defendant is entitled to have the existence of a prior criminal record concealed from the jury, a protection the Court found "so well understood that discussion of it is unnecessary." Ibid, at 490.

The Court's analysis of the leading cases on this issue reveals that the major concern, and the effect sought to be prevented, is the jury inferring, either from the nature of the photograph or the manner of its introduction, the fact that the photograph is a mug shot. Thus, in Barnes v. United States, 365 F.2d 509 (D.C.Cir., 1966) the court found the photos themselves suggestive of their source, while in Harrington the manner of their

introduction was found objectionable for similar reasons. In United States v. Colarco, 424 F.2d 657 (2d Cir., 1970) the introduction of mug-shot photographs was found not to be objectionable because the jury could have believed them to be photos taken at the time of the arrest for the charges on trial. As the Harrington court said in explaining Colarco

Judge Anderson did not allude to any incidents occurring during the introduction of the pictures into evidence that might have aroused the jury's suspicions regarding the source or nature of the photographs.

490 F.2d at 491. Had such incidents occurred, clearly the results would have been otherwise.

Applying these principles to this case, the conclusion is inescapable that appellant LAWS was deprived of a fair trial. Indeed, this case appears to be one of first impression since, unlike the cases discussed, the jury was directly told the nature of the photographs when the witness RYBACKI a New York City Police Detective, blurted out that the photographs were Police Department photos. Although it may well be that the Government went to great lengths to camouflage the nature of the photographs, the harm sought to be prevented by that effort was nevertheless caused by the witness' statement. Even if the existence of LAWS' criminal record could not have been inferred from the photos themselves, the witness' "inartful"* answer left no doubt about that fact in

*It will be assumed, arguendo, that the Government in good (continued on next page)

the jury's mind.

Nor can it be argued, as the prosecutor attempted to do during colloquy with the Court, that the jury could have thought the photos were taken during the instant arrest. The police witness testified that Brown viewed them on January 8, 1976; the indictment was filed April 15, 1976 and alleged that the conspiracy continued until that date. Clearly, then, appellant could not have been arrested on January 8, and the jury had to know that. Cf., United States v. Colarco, supra.

Finally, at the very least the trial Court should have responded to its sua sponte duty to give immediate curative instructions to the jury to minimize the obvious damage done. Cf., United States v. Robinson, 406 F2d 64 (7th Cir., 1969). Instead, the Court overruled defense counsel's motion for a mistrial without a word of explanation to the jury, leaving the latter with the distinct impression that what had just transpired was significant.

We believe that in view of the other prejudicial evidence

faith felt the need to introduce this evidence in an effort to overcome an apparent weakness in its identification evidence, given the witness Brown's refusal to identify Laws in court. To that extent, then, the Government may have satisfied the first prong of the Harrington test. However, the prejudice to appellant, as measured by the other two prerequisites of Harrington, was real and substantial, and the prosecutor's "mea culpa" statement to the court after the incident did not cure the error.

admitted against appellant (see POINT I, *supra*), there is a substantial probability that the jury believed appellant was a long-standing narcotics dealer with a criminal record. Given the failure of a crucial government witness to make a proper in-court identification of appellant, and given the weakness of the other evidence against him, the introduction of the mug-shots played a significant role in appellant's conviction, see Harrington, *supra*, 490 F2d at 495-496. Therefore, there must be a new trial.

POINT III

PURSUANT TO RULE 28 (i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, THE APPELLANT JAMES LAWS HEREBY ADOPTS AND INCORPORATES BY REFERENCE THE POINTS AND ARGUMENTS OF CO-APPELLANTS AS THEY MAY APPLY TO HIM.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT OF CONVICITON MUST BE REVERSED AND THE CASE MUST BE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

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A

TESTIMONY OF JOHN BROWN

He came up and he wanted to purchase an ounce or two ounces of coke. While he was there he told me to come to the window. He wanted to show me something.

I went to the window and he pointed out a brand new Eldorado Cadillac with a vinyl top. I think the car was green. He said that he had just bought it.

Q Did you give him any drugs on that occasion?

A Yes, one or two ounces of cocaine.

Q Mr. Brown, I believe you previously testified concerning a man named Tobe. Do you recall that, on Friday?

A Yes, I do.

Q Do you know Tobe's true name?

A No, I don't.

MR. BELLER: Your Honor, may I approach the bench with Mr. Siff and Mr. Diller.

(At the side bar.)

MR. BELLER: On Friday after court the following occurred:

We were upstairs to my office and Mr. Brown asked if Tobe was in court. I told him that I couldn't tell him anything about that.

He said that he had seen a man who looked like Tobe but he didn't want to point out the wrong person.

1 ars

. Brown - direct

1196

2 I asked him to explain that. He said that
3 the person who was sitting where James Laws is sitting
4 looks like Tobe but that the witness knew Tobe to have
5 gray hair, a full head of gray hair and this person had
6 dark hair so he wasn't sure.

7 I wanted to get counsel's feeling about my
8 bringing out this conversation and then have a ruling from
9 the Court as to whether it is permissible or not or whether
10 they are willing to concede that the defendant knew Brown.

11 MR. SIFF: I am not willing to concede that
12 for obvious reasons.

13 I think Mr. Beller's recitation of the con-
14 versation with Brown would indicate that he is not being
15 a truthful witness because of his failure to state that
16 he didn't want to point out who he thought wasd Laws in
17 case he was wrong about it. Thus he is not giving the
18 kind of testimony with regard to Mr. Laws that we should
19 expect from a witness that gives us truthful answers to
20 questions when they are asked.

21 His answer was that he saw somebody in court
22 who he thought was Laws but wasn't sure and therefore he
23 didn't want to be mistaken and didn't testify.

24 THE COURT: It seems to me you got the reverse
25 side of the coin, Mr. Siff.

1 ars

Brown - direct

1107

2 MR. SIFF: I am supposed to.

3 THE COURT: But I think you are arguing the
4 wrong point here.

5 All right, I understand your position.

6 It seems to me, Mr. Beller, you can have him
7 identify him assuming he is prepared to do that. I don't
8 know. Is he prepared to do that?

9 MR. BELLER: All I know is I can't ask him
10 again.

11 THE COURT: He may well be asked on cross-
12 examination why he didn't identify him the first time around
13 and I assume he would give the answer you gave.

14 MR. BELLER: Is your ruling we can bring out
15 the conversation at this time? Because I can't him
16 now is this the man in court today and have him point out.
17 I don't think he is prepared to do that either. He doesn't
18 know now that that is Laws. All he knows is that the
19 man looks like Laws but he had gray hair.

20 I am not going to bring anything else out
21 unless I can bring out the conversation.

22 MR. SIFF: I don't think you can bring out the
23 conversation between Mr. Beller and Mr. Brown for the
24 purpose of his failure to identify the defendant.

25 MR. DILLER: I would also point out I was

1 surprised to hear that this witness doesn't even know the
2 true name of the man Tobe. If you recall with respect
3 to almost every other individual the witness knew the
4 last name.
5

6 THE COURT: You are arguing something else.

7 MR. SIFF: With regard to the Government's
8 theory of the case and the material given to us do I under-
9 stand that --

10 MR. BELLER: We are not going to go ahead with
11 it if there is an objection.

12 THE COURT: Just a minute, gentlemen.

13 Mr. Beller, what is the question you wish to put
14 to this witness?

15 MR. BELLER: I would ask him whether he had a
16 conversation Friday after court in my office concerning
17 Tobe. Yes.

18 What did you say? What happened?

19 I asked you if he were in court and you told
20 me you couldn't say anything about.

21 I said there was a man who I didn't want to
22 identify as the wrong man -- actually there was some con-
23 versation then.

24 Later on I asked him what does that mean that
25 you didn't want to identify the wrong person?

1 I didn't want to point out a man that looked
2 like Tobe because I knew a man with gray hair.

3 MR. SIFF: He does have gray hair on the side
4 of his head.

5 THE COURT: Not very much.

6 MR. BELLER: I might say on Friday agents
7 after the defendant did not identify him as James Laws,
8 agents came and said the arresting officer told him that
9 Laws has dyed his hair since the arrest and probably we
10 are going to prove that if it becomes an issue.

11 In any event, the witness knows Laws with a
12 full head of gray hair.

13 MR. SIFF: If he is thinking of testifying that
14 he dyed his hair since the arrest I will have to be a
15 witness in this case.

16 THE COURT: Let me reserve decision on this,
17 we have some time on it.

18 (In open court.)

19 MR. BELLER: May I have the last question and
20 answer read back?

21 THE COURT: You may.

22 (Record read.)

23 BY MR. BELLER:

24 Q When did you meet Tobe for the first time?
25

ars

Brown - direct

1200

A In 1956.

Q Where?

A At Lenox Avenue - 126th Street.

Q Prior to your going to Atlanta in 1960 did you see Tobe in New York?

A Yes, I did.

Q Now, after you returned to New York, did there come a time when you had a conversation with Tobe about his purchasing drugs from you?

A Yes, I had a conversation with him?

Q When did that occur?

A In the summer of 1970.

Q Where did it occur?

A At Seventh Avenue on ~~118th Street.~~

Q Tell us what happened?

A During this day I was in the vicinity of 118th Street and Seventh Avenue to see a friend of mine.

While I was there Tobe was talking to another man. He saw me and he waved to me and said that, "Hey, I want to see you before you leave."

Before I left he came over and said to me that I know what you are doing, I don't want you to say yes or no. I want some coke.

I sort of laughed at it and he said he was

1 ars

Brown - direct

1201

2 serious but that was not in a serious manner, the way he
3 said it.

4 I told him that I could arrange to do some
5 business with him and he asked me when.

6 I said, "Soon."

7 That same week I went uptown and I saw him and
8 I told him whenever he was ready he could come down to
9 my apartment at 180 West End Avenue. I gave him the
10 apartment and also gave him my phone number.

11 Q What happened next?

12 A He came down and at that time he purchased
13 from me a kilo of cocaine.

14 Q Did you have a conversation --

15 MR. SIFF: Can we have a time fixed for this,
16 your Honor?

17 THE COURT: Yes.

18 A That was in I would say in June of 1970.

19 Q Did you have a conversation with him at that
20 time about future transactions?

21 A He asked me in the future would it be all right
22 to send his girl down to cop, meaning to, you know, to get
23 the dope for him because he had a little heat on him and
24 didn't want to come down too often.

25 Q What does that mean his girl?

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Brown - direct

1202

A His girl friend that he was going with.

Q What did you say to this proposition?

A I told him if he stood behind her that I would.

Q Thereafter did you continue to have dealings with Tobe?

A Not directly.

Q In what fashion?

A The girl would come down for him.

Q What would happen on those occasions?

A He would call me and tell me to expect the young lady that he referred to as his girl.

She would come down and I would give her whatever she had money for. Sometimes it was a quarter, a half a ki, to build up to a ki of cocaine.

Q How often did you see this woman for Tobe?

A No more than once a month.

Q Through what period of time did you have dealings with Tobe?

A L970 until 1972.

Q Which part of 1972?

A During the summer months of 1972.

Q What kind of drugs was Tobe purchasing from you?

A Cocaine.

1
2 Q Do you recall the date of any particular
3 transaction or do you recall any particular transaction?

4 A Between Tobe and myself?

5 Q Yes, sir.

6 A Yes. Tobe called me one day and told me that he
7 didn't feel good and he was sick and had a fever and wanted
8 to know if I would do him a favor and come out to the house,
9 meaning Astoria and give him a package.

10 I told him that I would and I took him a kilo
11 of coke out to him house where he was living.

12 (Continued on next page.)
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Brown-direct

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Q When did that occur?

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A In 1972.

4

Q Which month?

5

A March or April.

6

Q Do you recall any other transactions?

7

A No.

8

Q Do you know a man named Bay Brown?

9

A Yes.

10

Q Did you ever have a conversation with Bay Brown

11

about Tobe?

12

A Yes, I did.

13

Q Does that refresh your recollection in any way

14

as to any particular transaction in narcotics that you had

15

with Tobe?

16

A It does.

17

Q Will you tell us about that, please?

18

A In 1971, during the months of October and November,

19

I was dealing with a friend of mine whose name was Bay Brown,

20

who is deceased now. He came to my house and asked me did

21

I know that Tobe --

22

MR. SIFF: Objection, your Honor.

23

Q Without telling us what Bay Brown told you,

24

do you recall when it was you had this conversation with

25

Bay Brown?

rmh2

Brown-direct

1
2 A Yes.

3 Q When?

4 A In 1971, in November.

5 Q Thereafter did you have occasion to see Tobe?

6 A Three weeks later I happened to see him.

7 Q What happened?

8 A , At this time he told me that he had a problem,
9 he had gotten -- --

10 Q Let me focus your attention a little bit more.
11 Did you have a conversation with him about narcotics?

12 MR. DILLER: Objection to the leading.

13 MR. BELLER: I will withdraw it. Your Honor, we
14 better approach.

15 (At the side bar)

16 MR. BELLER: Who made that objection?

17 MR. DILLER: I did.

18 MR. BELLER: Do you want to press that objection?
19 The witness is about to say that, first of all, he had a
20 conversation with Bay Brown and he told him Tobe was arrested
21 in California and he is about to tell us Tobe told him he
22 was arrested in California. I don't really want to bring
23 that out and that is why I interrupted the witness. If
24 you object, I will let him go ahead.

25 MR. DILLER: No, I don't.

1 rmh 3

Brown-direct

2 MR. BELLER: You better withdraw your objection.

3 MR. DILLER: I withdraw the objection.

4 THE COURT: Is there any reason, Mr. Beller, given
5 what you said about identification, that you can't make
6 a start by asking him for a description of Tobe?7 MR. BELLER: I am going to do that. Could I have
8 this objection withdrawn in front of the jury?9 MR. DILLER: ~~I just withdrew it.~~10 MR. BELLER: I would like it withdrawn in front
11 of the jury so it doesn't appear we are trying to hide any-
12 thing. If you withdraw the objection --

13 MR. DILLER: All right.

14 THE COURT: All right.

15 (In open court)

16 MR. DILLER: If it please the Court, my last
17 objection is hereby withdrawn.

18 THE COURT: All right.

19 BY MR. BELLER:

20 Q After this conversation with Bay Brown in
21 November of 1971, did you have a transaction involving
22 cocaine with Tobe?23 A Yes, I did.24 Q Tell us about that, what were the amounts and
25 how did it happen?

1
2 A He came to my house, this was about three weeks
3 after I had had a discussion with Bay Brown, and at this
4 time he wanted to purchase some coke.

5 Q Did he?

6 A No, but he left me the money and later on I think
7 his girl came to pick it up.

8 Q What did she pick up?

9 A A kilo of cocaine.

10 Q Would you describe the man you have referred to
11 as Tobe? What did he look like, when you knew him?

12 A He was about five-nine, he had a full head of
13 gray hair, dressed very nice --

14 Q Was he a white man or a black man?

15 A He was a black man, nice features.

16 Q Do you know a man named Shi?

17 A Yes, I did.

18 Q Do you know his true name?

19 A No, I don't

20 Q When did you meet Shi?

21 A I met him in 1956 or -- 1956.

22 Q Did you see him prior to your going to jail in
23 1960?

24 A No, I did not.

25 Q Just met him that one time?

B

TESTIMONY OF MICHAEL PARKER

1
2 A When she returned downstairs we drove back
3 to 10 West 66th.

4 Q And then what did you do after you got back to
5 10 West 66th?

6 A We went up to the apartment at 10 West 66th,
7 Jodi's apartment, went into the apartment and Jodi went
8 in the bedroom of Jack with the briefcase.

9 Q Q Mr. Parker, during this period that you were
10 living in New York, February '71 to July '72 did you
11 ever meet a man by the name of Tobe?

12 A Yes, I did.

13 Q Do you know his true name?

14 A No, I don't.

15 Q Would you look around the courtroom, tell the
16 Court and jury the man who was introduced as Tobe during
17 this period is present in court and again in order to see
18 everybody sitting here if you have to stand up or even
19 get down from the witness chair?

20 A Yes, he is.

21 Q Would you point him out for the Court and the
22 jury?

23 A He's sitting in the first row in the, on the
24 bench, the last one on the bench. He has on a light
25 blue shirt, and dark blue coat.

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Parker - direct

3394

Q Is that to your right or your left?

A My right.

MR. SEAR: May the record reflect that he has identified the defendant Laws?

THE COURT: It may.

MR. SEAR: Thank you.

Q During this time did you learn whether or not there was a relationship between Jack and Tobe?

A Yes.

Q And from whom did you learn this?

A From Jack.

Q And what did he say?

MR. DILLER: I am going to object, if your Honor please.

THE COURT: Overruled.

MR. DILLER: May we have a side bar?

THE COURT: No, I don't see any need for a side bar.

MR. DILLER: Well, the objection I want to assert the reason for the objection.

THE COURT: All right.

(At the side bar.)

MR. DILLER: Unless I'm wrong I believe this witness is about to tell a narrative of what Jack told him

as distinguished from anything that has happened in his presence or to his observation. Thus my contention would be it would merely be a narrative hearsay and nothing said in furtherance of this conspiracy, and thus would not come in as an exception.

THE COURT: Well, I assume it is in furtherance of the conspiracy.

MR. DILLER: ~~We ask for an offer.~~

MR. SEAR: He will say that he learned that --

THE COURT: Jack Brown told him what?

MR. SEAR: That Tobe was purchasing narcotics from Jack Brown. And then he will testifying to seeing Tobe at 180 on a few occasions, perhaps two or three, go in the back bedroom with Jack and leave, and he will also testify I believe to two trips that he took to Tobe, one to deliver narcotics with Jodi and the other one to pick up money, a trip that he took with Jack Brown to pick up money from Tobe for narcotics, Tobe owed for narcotics.

THE COURT: All right.

MR. DILLER: Are you going to establish a date?

MR. KEEGAN: What's the date of the conversation?

1 dws

Parker - direct

3396

2 MR. SEAR: Okay, I'll ask him.

3 MR. KEEGAN: As I understand the Court's
4 rule yesterday the witness did not become a member of the
5 conspiracy till March or April of '71, so if it has, the
6 conversation must come after that date or else it's not
7 admissible.

8 THE COURT: Absolutely.

9 MR. SEAR: Could I address myself to that
10 point just very briefly, 20 seconds. I would maintain
11 that they come under the conspiracy doctrine even before
12 that date, but aside from that statements that Jack Brown
13 made in '71 or even in '70 to anyone about his customers,
14 if Jack Brown testified to those same things on the
15 stand, those statements are prior consistent statements
16 by Jack Brown and they certainly are admissible because
17 they're prior to any time when he cooperated with the
18 Government or he had any inducement by the Government to
19 say anything at all.

20 MR. KEEGAN: It would be useful against Jack
21 Brown's admissions, but not as against others.

22 MR. SEAR: There are prior consistent state-
23 ments by Jack Brown that are admissible and corroborating
24 the fact.

25 THE COURT: Prior consistent statements are

admissible it seems to me on the redirect of that very witness and not through some other witness.

MR. SEAR: I think extrinsic proof as to prior consistent statements, your Honor, is always admissible.

THE COURT: You've got to show what it is that is allegedly attacked here before you can put in this prior consistent statement.

MR. ROSENBAUM: It has not come up.

MR. SEAR: Your Honor, throughout the whole cross-examination of Jack Brown there was extensive conversation.

THE COURT: I'm not going to get into those under circumstances, Mr. Sear, to have him say to somebody who is not a member of the conspiracy.

MR. ROSENBAUM: Could I ask your Honor for a ruling in the event the witness mentioned a name sort of as part of his braggadocio statements without any further proof as to any transactions or anything else, is that considered hearsay or is that in furtherance of a conspiracy?

THE COURT: I don't know. I can only rule on it when it's before me.

All right.

2 (In open court.)

3 BY MR. SEAR:

4 Q Mr. Parker, approximately when was it that
5 you learned of the relationship between Tobe and Jack
6 Brown?

7 MR. DILLER: I'm going to object. I thought
8 we were going to set forth the date of the conversation.

9 THE COURT: ~~Yes, I assume that is what is~~
10 intended by this question. Now let's put it on this
11 basis.

12 Go ahead.

13 Q When did you have a conversation with Jack
14 Brown about his relationship with Tobe to the best of your
15 recollection?

16 A To the best of my recollection around May,
17 maybe June of '71.

18 Q And what did he --

19 A Well, I'll say as far as having a conversation
20 with him it would have to have been after I had seen Tobe
21 twice, the fall of '71, after the fall of '71.

22 Q What did he tell you on that occasion?

23 A Wait a minute, I'm sorry. I made a mistake.

24 The occasion I remember having the conversation
25 with Jack about Tobe was in the fall of '71 when me and

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Parker - direct

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Jodi went uptown somewhere in Harlem, around 140th Street to deliver half a kilo of cocaine to Tobe.

Q Did you have any conversation with Jack Brown about his relationship with Tobe before that?

A No more than Tobe was a friend of his when I first met him.

Q Did you see Tobe at all at 180 while you were living in New York?

A Yes.

Q About how many times?

A Twice.

Q And what happened on those occasions?

A One time Tobe came to 180 West End Avenue to see Jack. It was a couple of people in the apartment sitting around in the living room. I don't remember exactly who it was.

Tobe came there and he went in the bedroom with Jack. He stayed for about five minutes, maybe an hour. Then he left.

Q What happened on the second occasion at 180?

A On the second occasion Tobe had also come to 180 to see Jack. He came to the apartment and as he arrived, or when he arrived, Jack, myself and Jackie, my wife, were going to 10 West 66th Street and Jack asked

1 dws

Parker - direct

3400

2 Tobe to drive us over there.

3 Q What happened when you got there?

4 A We all went upstairs in the apartment and we
5 sit around the living room for five or ten minutes and
6 then Tobe went in the bedroom with Jack.

7 Q You've mentioned taking a trip with Jodi.
8 Now again when did this occur?

9 A Fall of 1971.

10 Q Did you have a conversation with Jack before
11 you took this ride?

12 A Yes. It was --

13 Q What did he say?

14 A It was almost identical as to the Don Wilson
15 trip we were in 180. Jack asked me to take a ride with
16 him. He had the same briefcase. We went downstairs,
17 got in the car.

18 On the way to Jodi's Jack told me that he
19 wanted me to take Jodi uptown to meet Tobe.

20 Q And then what did you do?

21 A We pulled up in the garage again. Jodi was
22 waiting for us downstairs in the garage. Jack got out
23 of the car and he went upstairs.

24 Before he went up he gave Jodi the briefcase.
25 Then we drove uptown to around 140th Street and Eighth

Avenue in Harlem.

Q What did you do when you got up there?

A Jodi, when he got where we were going, Jodi told me to park the car and she walked around the corner, got out --

Q How long was she gone?

A She was gone about an hour.

Q When she got back did you have a conversation with her?

A Yes. She said that she was sorry she took so long and the reason she took so long was because she had to count the money.

Q Do you know how much money she had?

A No, I don't.

Q Did she tell you how much money she had?

A I don't remember.

Q Did she have the briefcase with her when she came back?

A Yes.

Q And about how long did this entire trip take?

A Around two, two and a half hours.

Q Around this same time in the fall of '71 did you take a ride with Jack some place out in Queens?

A Yes, we did.

2 Q And was this before or after the trip that
3 you had taken up to Harlem with Jodi, the one you just
4 told us about?

5 A This was after.

6 Q How much after, do you know?

7 A Maybe a month or maybe a month and a half.

8 Q Before going with Jack on this ride did you
9 have a conversation with him?

10 A While riding with him I had a conversation.

11 Q And where did you leave from?

12 A We left from either 180 or 10 West 66, I'm not
13 sure.

14 Q What car did you take?

15 A The Grand Prix.

16 Q Do you recall what time of day it was?

17 A It was morning around ten to eleven o'clock.

18 Q What happened? What did Jack say while you
19 were in the car on the way there?

20 A He told me that he was on the way out to Tobe's
21 house, because Tobe he wanted to go see Tobe because Tobe
22 owed him money.

23 Q Did he say why Tobe owed him money?

24 A No, he didn't come out and say why Tobe owed
25 him money.

1 Q And how long did it take you to get where
2
3 you were going? 4/5

4 A Around four or five minutes.

5 Q And where was it that you got?

6 A Out in Queens off of Astoria Boulevard.

7 Q What happened when you got there?

8 A When we got there Jack pulled up' almost, pulled
9 up' by the house.--- He parked the car--- He got out and
10 he walked into the yard on the side of the house and he
11 knocked on the door.

12 Q It was a house right next to the car or was it
13 in the front or in the back?

14 A The house was a little in front of the car
15 because I could see him walk down the side of the house.
16 The house, the car was a little behind the house. In
17 other words, the house was made like it wasn't straight
18 across the street. It was into the block like sideways
19 like.

20 Q Ans after he walked out and up to the house
21 what happened?

22 A He was out of the car knocking on the door
23 and also on the window for about 10 or 15 minutes.
24 And after that he returned to the car and he said to me
25 that he know he's in there but he must be asleep, and he

1 dws

Parker - direct

3404

2 either stayed in the car for five or ten minutes or we
3 went around the corner and made a call from a pay telephone
4 booth and back to the house. And then returned back.
5 and knocked on the door.

6 Q Did you go with him when he knocked on the
7 door?

8 A No.

9 Q How long, when he knocked on the door what did
10 he do?

11 A Tobe let him in. He went in the house.

12 Q And how long was he gone?

13 A Around an hour.

14 Q What did you do?

15 A I waited in the car.

16 Q And then what happened?

17 A Jack returned and we went back to either 10
18 West 66 or 180 West End Avenue.

19 Q And about how long were you gone for the whole
20 time?

21 A About three hours.

22 Q Mr. Parker, what did the man known to you as
23 Tobe look like during the time that you were living in
24 New York?

25 A If I'm not mistaken at that particular time

he had sort of, sort of salt and pepper hair. He was dark skin and a little shorter than I am, and a rather slim person.

Q Now again you may have answered this, but on the first trip to Lenox Terrace who did you go to see?

A Don Wilson.

Q Okay. Then the second trip who did you go to see?

A Tobe.

Q And what did you have with you?

A At both times we had a half a kilo of cocaine.

Q And when did these trips take place?

A Around the fall of '71. They were close together.

Q And what was the conversation that you had when you learned the relationship between Jack Brown and Tobe?

A That Tobe was buying cocaine from Jack.

Q And when did this conversation take place?

A Around the time that we went up to 140th Street and around Eighth Avenue to meet Tobe.

Q What did Jack say during that conversation?

A He told me that he wanted me to take, take Jodi uptown to take Tobe a half a kilo of cocaine.

1 dws

Parker - direct

3406

2 Q Did he say anything else about his relationship
3 with Tobe?

4 A No.

5 Q Mr. Parker, you've already identified yesterday
6 a man known to you as Boot, the defendant Sampson. Did
7 you see him while you were living in New York?

8 A Yes.

9 Q Where did you see him?

10 A Saw him at 180 West End Avenue, 10 West 66th
11 Street, and at fights in New York.

12 Q And when was that, when during the period
13 from February '71 to July '72?

14 A He was coming to New York on shortly after I
15 arrived up until '72. He came often.

16 Q When you say often, what do you mean?

17 A Approximately 20, 30 times.

18 Q I'm sorry. I didn't hear you.

19 A Approximately 20, 30 times.

20 Q Did you ever have a conversation during this
21 period about Jack Brown's relationship with Boot?

22 MR. COHN: With whom?

23 Q With Jack Brown?

24 A Yes, I did.

25 Q And do you recall when such a conversation

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TESTIMONY OF ESTELLE THOMPkins

hph 20

Tompkins-direct

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A Yes.

Q Going back for a moment, did Mr. Conte, Dick Conte have any cocaine with him before he spoke with Chinch?

A Not to my knowledge.

Q Do you know a man named Tobe?

A Yes.

Q Do you know him by any other name?

A James Laws.

Q Any other names?

A Tobe the Robe.

Q When did you meet Mr. Laws?

A I met Mr. Laws like '47 but I was probably introduced to him in 1960.

Q Did there come a time when you purchased drugs from him?

MR. DILLER: Objection, your Honor.

THE COURT: Overruled.

Q Did there come a time when you purchased drugs from him?

A In 1962 possibly.

MR. COHN: I move for a limiting instruction, your Honor.

THE COURT: Yes.

Ladies and gentlemen, this testimony is only

1 hph 21 Tompkins-direct

2 being received and to be considered by you against Mr.

3 Laws and not any other defendant.

4 Q Can you tell us what happened on that occasion?

5 Where were you and, --

6 MR. COHN: May we have a date?

7 THE COURT: This was in 1962.

8 A What happened was we met Tobe at 124th Street.

9 Q Can you tell us who "we" is?

10 A A Richard Conte and I met Tobe at 124th Street.

11 Tobe--

12 Q What city is this?

13 A New York City. Tobe at that time gave me

14 a package.

15 Q What time of day was this, do you recall?

16 A Late in the evening. Approximately 9 o'clock.

17 Q Can you tell us in as much detail as you can

18 remember what took place at that time?

19 A It had been a prearranged--

20 MR. DILLER: Objection to prearranged.

21 THE COURT: Sustained.

22 Q Can you tell us what took place at the time
23 you met with Tobe, Mr. Laws, at 124th Street in New York?

24 A Mr. Laws handed the package in the window of
25 the passenger's side of the car.

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Tompkins-direct

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Q Where were you and where was Dick?

A Dick was on the driver's side and I was on the passenger's side.

Q In a car?

A Yes.

Q On --

A On 124th Street, closest to 7th Avenue.

Q Was Mr. Laws inside the car or outside the car?

A Outside the car.

Q What took place?

A He passed a package in the window to me.

Q Directing to you?

A Yes.

Q And then what happened?

A And I held on to the package until we got back to the apartment.

Q Had you given him any money?

A I had not given him any money. Dickie had previously given him.

MR. DILLER: Objection.

Q Do you know how much?

A I'm not positive of the amount. At that time heroin was selling for a thousand dollars an ounce.

MR. DILLER: I move to strike, your Honor.

1 hph 23 Tompkins-direct

2 THE COURT: That's denied.

3 Q Did you ever learn what was in the package
4 that Mr. Laws had given to you that night?

5 A Yes, I used some of it that night.

6 Q What was it?

7 A Heroin.

8 Q And how much was in the package?

9 MR. DILLER: I will object and ask for a side
10 bar with respect to this.

11 THE COURT: That's not necessary. Overruled. Go
12 ahead.

13 A Approximately an ounce.

14 Q After that time did you deal directly with Tobe?

15 A No.

16 Q Did you have any conversations with Tobe or James
17 Laws concerning purchases of heroin?

18 THE COURT: What time are we talking about now?

19 MS.CUSHMAN: During the time immediately after
20 this transaction in 1962.

21 A No.

22 Q Did you speak with Mr. Laws concerning buying
23 heroin from him?

24 MR. DILLER: Objection.

25 THE COURT: The basis of the objection, I take

1 hph 24 Tompkins-direct

2 it, would be the time.

3 MR. REID: Asked and answered.

4 MR. DILLER: The question was asked and answered.

5 MR. REID: If the question preceding that was
6 read back, you will see she answered it.

7 THE COURT: If that is the only objection, I
8 will overrule it. Objection is overruled. You may answer.

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2 Q After this transaction in 1962 on 124th Street
3 did you speak with Tobe about further dealings with him
4 in heroin?

5 MR. DILLER: Your Honor, that question's been
6 asked and answered.

7 THE COURT: That question was answered.

8 A Your --

9 THE COURT: No, I'm sustaining that objection.

10 Q Did you have any conversation with Tobe
11 concerning a man named Shirt?

12 A Later on near '65 or somewhere during that
13 time I spoke with him concerning purchasing heroin and
14 I --

15 THE COURT: Who did you speak with?

16 A Tobe.

17 Q And what did you say to him and what did he say
18 to you?

19 A And I spoke to him concerning purchasing
20 heroin and he suggested that I see a man named Shirt.

21 Q Did you meet with Shirt?

22 A Yes, I met with Shirt at his apartment.

23 Q Was anyone else present?

24 A At that time Tobe was present.

25 Q What happened?

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Torokins - direct

5795

A I purchased heroin from Shirt.

Q How did you pay for this heroin?

A I paid for that heroin with stolen merchandise with shoplifted merchandise.

Q Directly with the clothing?

A Yes.

Q Did you have any further dealings with this man named Shirt?

A A Yes: yes.

Q How long did you continue to purchase heroin from him?

MR. COHN: I object, your Honor.

THE COURT: Just a minute now.

MS. CUSHMAN: I can rephrase the question, your Honor.

THE COURT: All right.

Q Did you purchase any heroin from Shirt after that?

MR. COHN: Objection.

MR. FRANKEL: Object to that, your Honor.

THE COURT: Overruled.

A I purchased from Shirt until he went to jail later on in the '60s probably.

Q Over what period of time?

1 A Well I guess it extended into a year or
2
3 better.

4 Q And did you always pay him in clothes or did
5 you pay him in cash?

6 A Paid him in clothing most of the time.

7 Q Was Tobe ever present when you paid Shirt for
8 the heroin that you were purchasing from him?

9 A When I paid Shirt with clothing?

10 Q Yes.

11 A Couple of occasions Tobe was there.

12 Q And what would take place on those occasions?

13 A Well, if Tobe wanted something out of the
14 clothing he got something out of the clothing. I guess
15 he didn't get it directly from me. I gave Shirt the
16 merchandise and maybe Tobe may have wanted a couple --

17 THE COURT: Strike all this out, "may have," and
18 so on. Strike it out.

19 Come up to the side bar, please.

20 (At the side bar.)

21 THE COURT: Now, Ms. Cushman, a certain amount
22 of background is fine but why are we getting into the
23 details of these transactions with Shirt?

24 MS. CUSHMAN: Your Honor, because Tobe placed
25 orders for the clothing that she was paying Shirt with and

1 Tobe made the introduction. Tobe in effect sponsored
2 Shirt and her dealings with Shirt and from time to time
3 would take the merchandise that she was paying Shirt and
4 take it for himself.
5

6 He would either ask for size 10 or 12 dress
7 and she would be giving it to Shirt in payment for the
8 heroin she was receiving from Shirt but the merchandise
9 would be in fact going to Tobe who was present during the
10 transaction.

11 MR. DILLER: What would the relevancy be of
12 that in connection with this case is the first objection.
13 Also, the reason I asked for the side bar earlier this is
14 the first time in the entire case that any testimony with
15 respect to James Laws is coming out concerning heroin.
16 The testimony of two other witnesses namely Brown and
17 Parker, had only reference to cocaine and this would be
18 highly prejudicial with respect to Tobe since he hasn't
19 been charged with heroin in this case, and for this jury
20 now to hear testimony with respect to a 16-year old trans-
21 action allegedly concerning heroin would be highly
22 inflammatory to this jury, especially since he's not being
23 charged with that. It's not a prior similar act.

24 MR. BELLER: There are several misstatements
25 there.

1 MR. DILLER: And I would move to strike it for
2
3 that.

4 MR. BELLER: Mr. Diller has the 3500 material
5 in which shortly after these transactions Tobe and Shi
6 began to deal together with this witness. As I read
7 the indictment in his charge of conspiracy to violate the
8 narcotics laws in distributing heroin and cocaine.
9 I don't know where you say that he wasn't involved and
10 ~~he's not charged with heroin. It's news to me.~~

11 MR. DILLER: There's been no specific
12 testimony with respect to Tobe concerning heroin.

13 MR. BELLER: You just heard it.

14 THE COURT: Well, it seems to me that while a
15 certain amount of background is appropriate what troubled
16 me was she said, "Maybe, maybe Tobe got the clothes" or
17 "Tobe might have gotten the clothes."

18 MR. BELLER: I think, your Honor, there is a
19 problem with the use of speech. I think what she said
20 was, she was saying, he may have wanted a certain piece
21 of clothes. There's no question he took the clothing.
22 I think what she said, he might have wanted a piece of
23 clothing, well he took it, he might have wanted it.
24 I don't think she's saying that he might have taken it.

25 THE COURT: Somehow or other the language of

city?

A I met Shi in New York some time in '66 or '67.

Q Was there anyone else with Shi when you met
him?

A He came up to the apartment with Tobe.

Q Did there come a time when you dealt in
narcotics with Shi?

A Yes.

Q When was that, what year and what month, if
you remember?

A As I can remember it was in 1968.

Q What part of 1968, do you recall?

A Before the, or around the time of the Kennedy
assassination.

Q Is that Robert Kennedy?

A Yes.

Q What took place on that occasion?

A I had came up to New York and had been given
some money to purchase cocaine.

Q Who had given you the money?

A George Willis.

Q How much money?

A He had given me \$500 at the time.

Q What did you do in New York?

A

TESTIMONY OF EDWARD RYBACKI

1 hph 17

Rybacki-direct

2 will have to do it before the end of the trial. It puts
3 in a rather difficult position at this stage in the trial.

4 THE COURT: Then if you will get me a subpoena,
5 I will authorize it and you can serve it in Washington.

6 MR. BELLER: Your Honor, we need to have the record
7 but as I remember this came from a little earlier. Brown
8 said that he met him in 1968.

9 THE COURT: Mr. Beller, this whole thing could
10 have been taken at 4:30, quite frankly. Let's go on with
11 the jury and finish the day. I know it's not through your
12 doing.

13
14 E D W A R D R Y B A C K I, having been duly sworn,
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. SEAR:

18 Q Mr. Rybacki, I'm going to ask you to keep your
19 voice up and speak into the microphone. How are you
20 employed?

21 A I'm a detective in the New York City Police
22 Department.

23 Q How long have you been employed by the New
24 York City Police Department?

25 A 14 years.

1 hph 18

Rybacki-direct

2 Q I direct your attention to January of this year,
3 specifically January 8th of 1976. Where were you assigned
4 on that day?

5 A I was assigned to Cintac 8, Region 2, New York.

6 Q Is that connected with the United States
7 Attorney's office, Southern District of New York?

8 A Yes, it is.

9 Q That was involved in connection with this case?

10 A Yes.

11 Q I direct your attention to the afternoon of
12 January 8th. Generally, where were you?

13 A I was with John Theodore Brown, also known
14 as Jack Brown at a location in New York State.

15 Q Was anyone else present?

16 A Yes, sir, there was a special agent Winowski
17 from DEA and an assistant from the United States Attorney's
18 office.

19 Q During that afternoon, did you have occasion
20 to show certain pictures to Jack Brown?

21 A Yes, I did.

22 Q In fact, did you show him a spread of approxi-
23 mately 14 pages of pictures containing approximately
24 70 photographs of various individuals?

25 A Yes, sir.

1 hph 19 Rybacki-direct

2 Q What did you tell him when you showed him these
3 pictures?

4 MR. MITCHELL: Objection.

5 THE COURT: I think I know what's involved here.
6 Overruled. Go ahead.

7 A I told him that the looseleaf binder that I had,
8 contained photos, that I wanted him to look at the photos,
9 and identify the people in the photos. I told him that
10 as he made the identifications, I had the key sheets with
11 blank boxes with corresponding pages, to the pages in the
12 photo spread; I told him as he identified them I would
13 write the name of the person, either the true name or
14 the name that he knew the person by in the corresponding
15 box.

16 Q Did he look at the photographs?

17 A Yes, sir, he did.

18 Q And after he looked at, say, the first page
19 of the photographs, what happened?

20 A I showed him the page that I had written, printed
21 in my own hand and said are these the identifications
22 that you made. He said yes. He initialed each box and
23 on the bottom of the page he initialed and dated it and
24 then Agent Winowski and myself initialed and dated the
25 page and we went on to the next page.

1 hph 20

Rybacki-direct

2 Q Is it true the first page of this spread
3 of photographs contained six photographs, three in one
4 column and three in another?

5 A Yes.

6 Q After he indicated who, if any of those people
7 he knew and he told you, you wrote those names down in
8 the corresponding box on a separate sheet of paper, is
9 that right?

10 A Yes, sir.

11 Q And the procedure was if he identified a photo
12 in a particular location, you would put the name in the
13 same location the sheet of paper, is that right?

14 A Yes, sir.

15 Q And after he gave you the name and after you
16 wrote it in that box, you told them what you had done and
17 he initialed each of the boxes?

18 A Yes, sir.

19 Q Following this procedure, did he identify certain
20 individuals contained in this photo spread?

21 A Yes, he did.

22 Q I show you Government's Exhibit 136 for
23 identification and I ask you if that is the spread of photos
24 that you displayed in the manner you have just described
25 to Jack Brown on January 8, 1976?

1 hph 21

Rybacki-direct

2 MR. RICHMAN: Your Honor, I object to this
3 line of questioning. We have gone through that already.

4 THE COURT: Overruled.

5 MR. RICHMAN: Exception.

6 A Yes, it is.

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Q And I show you Government 's Exhibit 136-A for identification and I ask you if these are the sheets which you referred to as key sheets which were initialed and the names were placed in in the manner that you have described?

A Yes, sir, it is.

Q And those are Jack Brown's initials and your initials at the bottom of each page?

A Yes, sir.

Q Along with Agent Winowski?

A Yes, sir.

Q I direct your attention to page 12 of Government's Exhibit 136 for identification and specifically to the photograph which appears in the upper left-hand corner of that page and I ask you first of all if that page was displayed to Jack Brown on January 8?

A Yes, it was.

Q And when it was displayed to Jack Brown did he identify, did he identify, did he state who he knew that individual to be?

A Yes, he did.

Q And at that time did you write in the corresponding block on page 12 of Government's Exhibit 136-A for identification the name which Jack Brown stated?

1 A Yes, I did.

2 Q And after he had concluded that identification
3 did you tell him that what you had written there?
4

5 A I certainly did. I showed it to him, also.

6 Q And did he initial that box on 136-A for
7 identification on page 12?

8 A Yes, he did.

9 Q For the record that's the upper left-hand block
10 on that page, is that right?

11 A It is, yes.

12 MR. SEAR: At this time, your Honor, we would
13 offer into evidence the photograph appearing on page 12
14 upper left-hand corner of Government's Exhibit 136 for
15 identification and also the corresponding box on page 12
16 upper left-hand corner of 136-A for identification.

17 MR. DILLER: I have an objection.

18 MR. MITCHELL: Does that have a name with it,
19 your Honor?

20 MR. GOTKIN: Can we see it, your Honor, please?

21 MR. SEAR: Certainly. I'll be happy to show
22 it to any counsel who would like to see it.

23 For the record Government's Exhibit 136-A is
24 Government's Exhibit 3505-G.

25 MR. DILLER: Your Honor, I would object and I

1 dws Rybacki - direct 5876
2 would ask for a side bar with respect to this.

3 THE COURT: Any objection from anyone else?

4 MR. MITCHELL: Yes.

5 MR. DILLER: I would ask for a side bar with
6 respect to it.

7 MR. MITCHELL: Your Honor, what I would like to
8 know is it being offered only against the person who is in
9 that box?

10 THE COURT: I assume it's being offered
11 generally as part of the case.

12 MR. SEAR: That's correct, your Honor. The
13 identification that was made.

14 MR. GOTKIN: Is this the only picture that's
15 going to be offered?

16 THE COURT: I understand.

17 MR. GOTKIN: Is it, Mr. Sear?

18 MR. SEAR: At this time.

19 THE COURT: All right, Mr. Diller, come up.

20 (At the side bar.)

21 THE COURT: All right, Mr. Diller, what's
22 your objection?

23 MR. DILLER: The basis of the objection is
24 we've been through this once before and that this photo-
25 graph was attempted once before to be introduced into

evidence along with other photographs and the objection at that time was that this photograph would be a clear indication that it was taken as a prisoner as a roques' gallery photograph.

MR. ANOLIK: That's been my objection.

MR. DILLER: And at that time, your Honor had excluded introduction of photographs into evidence and permitted the witness to merely state that like this witness Rybacki to state that Jack Brown indeed did identify the photograph of James Laws.

THE COURT: That objection I'll overrule.

MR. DILLER: You had ruled on this.

THE COURT: You're stating it's a roques' gallery photograph.

MR. DILLER: It would be clearly a photograph of someone who has previously been arrested. Your Honor had ruled on this once before in this case in connection with other defendants.

THE COURT: I don't have any memory of doing it with this. Whatever I may have done as to anybody else.

MR. SEAR: It was not done with reference to this.

MR. DILLER: With reference to Laws specifically, but with reference to all the defendants.

1 dws

Rybacki - direct

5878

2 MR. BELLER: No, there wasn't. If my memory --

3 THE COURT: In any event as I read an
4 evidence book that's available to me apparently DeCarlo
5 against the United States and other authorities such as
6 Clemens, 408, Fed 2d indicated that this evidence is
7 admissible.

8 MR. MITCHELL: As against Tobe only?

9 THE COURT: No, it's admissible as an evidence
10 of an out of court identification made by somebody else.

11 MR. DILLER: That was not the basis of my
12 objection.

13 THE COURT: I understand the basis fo your
14 objection. I overrule it.

15 MR. ANOLIK: Your Honor, I don't see how this
16 is binding upon anybody else. That's what bothers me.

17 THE COURT: Why not? It's Jack Brown's
18 identification of a co-conspirator, assuming that the
19 whole picture is credited.

20 MR. ANOLIK: Not of a co-conspirator. Of an
21 individual who was later indicted as a co-conspirator as
22 I understand it. So why should this be binding upon
23 anybody? Why is that binding on Mr. Brightman for
24 example?

25 THE COURT: This is part of the entire case

2 and I admit it as part of the entire case.

3 MR. ANOLIK: I think it's prejudicial.

4 THE COURT: Objection is overruled.

5 MR. SEAR: At this time, your Honor, I will
6 simply read to the jury the name which Jack Brown stated
7 and which Detective Rybacki wrote in.

8 THE COURT: Do you have any objection to that,
9 Mr. Diller?

10 MR. DILLER: No.

11 MR. SEAR: We don't display that.

12 MR. ANOLIK: May I ask for a qualified
13 instruction that this is subject to connection; they must
14 first prove the conspiracy.

15 THE COURT: I'm not going to do that.

16 MR. ANOLIK: If they don't find the conspiracy
17 it's not admissible at all against my client.

18 THE COURT: If they don't find the conspiracy
19 there is no case whatsoever, I agree.

20 MR. ANOLIK: That's true. That's what they
21 didn't do in Bertolotti.

22 (In open court.)

23 THE COURT: Go ahead, Mr. Sear, please.

24 MR. SEAR: Thank you.

25 Q I direct your attention to the photograph

appearing on the upper left-hand corner of 136 for identification. Let me ask you first of all who obtained this photograph for insertion in this photographic spread?

A I believe it was myself.

Q And whose photograph is that, if you know?

A It appears to be a New York City Police
Department photo.

MR. DILLER: Your Honor, I object and move for a mistrial.

MR. ANOLIK: Move for a mistrial, your Honor.

MR. RICHMAN: I move for a mistrial, entirely

prejudicial.

MR. REID: Move for a mistrial.

THE COURT: Come to the side bar, please.

(At the side bar.)

THE COURT: The whole idea was this was not supposed to be a rogues' gallery procedure.

MR. BELLER: It's an inartful usage. The question was who is the picture of? I would apologize for it.

MR. ANOLIK: I ask for a mistrial, your Honor.

THE COURT: You had the picture in evidence.
I received it in evidence. Why do you go on asking this
man about this picture?

MR. BELLER: Your Honor, let me take full responsibility for it since we couldn't supply the photograph to the jury.

THE COURT: Why can't you?

MR. BELLER: Because there's another photograph on the same page at the moment.

THE COURT: I received that picture in evidence.

MR. BELLER: Yes, your Honor, but since there's another photograph on the same page we didn't want to display it to the jury when the other photo has not been introduced in evidence. So Mr. Sear had asked the witness, is this a photograph of Tobe, and unfortunately the witness has given this response.

MR. DILLER: I alerted the problem.

MR. BELLER: I don't think it's very significant in view of the fact that we say that this is an arrest photo in this case, but --

THE COURT: Except it's three months before the arrest.

MR. BELLER: That's true, but I think there's no date that has come out as to Mr. Laws' arrest. I don't think it's a problem.

MR. DILLER: Judge, this is --

THE COURT: Now look, I'll consider your motion

overnight, but would you just please put the picture in evidence, put the fact it's identified as Tobe in evidence and leave it alone, all right? You ask every fresh question is a fresh peril as my father, who is a lawyer told me 35 years ago.

Is that all you want out of this witness? The picture is received in evidence. I'll reserve decision on the motion.

MR. ANOLIK: May I ask your Honor to look at Gregory against United States as to this sort of remark, not in identical words, that a witness with a desire to be helpful to the prosecution, a prosecution witness, blurts out something which in that case is called "an evidential harpoon", your Honor, and it's reversible error. Gregory against United States, a D.C. Circuit.

THE COURT: I don't anticipate that this man was doing anything with the idea of trying to sneak something in.

MR. ANOLIK: I think he was, your Honor.

THE COURT: I don't get that meeting. In any event let's go ahead.

(In open court.)

MR. SEAR: I offer the relevant portions of 136 and 136-A, your Honor.

1 THE COURT: Very good. They are received.

2 MR. ANOLIK: I object based upon our conference
3 at the bar.

4 THE COURT: They are received..

5 Objection is overruled.

6 (Government's Exhibit 136 and 136-A were
7 received in evidence.)

8
9 MR. SEAR: Just page 12, the upper left-hand
10 block on each exhibit.

11 No further questions of this witnessd- your
12 Honor.

13 THE COURT: All right.

14 Any cross-examination?

15 MR. DILLER: No questions.

16 THE COURT: All right.

17 You're excused.

18 MR. ANOLIK: I have a question, your Honor.

19 THE COURT: You have a question? Very good.

20 CROSS EXAMINATION

21 BY MR. ANOLIK:

22 Q Sir, how long have you been a detective?

23 A About five years.

24 Q Have you ever testified in court before?

25 A Yes, sir.

ROBERT B. FISKE JR.

